No 514

SUPREME COURT OF THE UNITED STATES.

COMMERCE TITLE GUARANTY COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Circuit Court of Appeals for the Sixth Circuit

and

BRIEF IN SUPPORT THEREOF.

WALTER P. ARMSTRONG,
J. E. McCADDEN,
Memphis, Tennessee,
Attorneys for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Page

Subject Matter.

Petition for Writ of Certiorari.....1–10

Summary Statement of the Matter Involved..... 1

Decision of Circuit Court of Appeals and date thereof 6

Statutes Involved 6

Jurisdictional Statement 7

Question Presented 8

Reason Relied on for the Allowance of the Writ... 8

Brief in Support of Petition.....11–22

Statement of Grounds of Jurisdiction..... 11

Statement of Case 12

Specification of Errors 12

Argument 13

The Circuit Court of Appeals found that petitioner possessed every characteristic of an insurance company and that the major portion of its income was derived from premiums plus investment income, but notwithstanding this, held, as a matter of law, it was not entitled to classification as an insurance company because the major portion of its income was not derived from premiums..... 13

The effect of the opinions of this Court in **Bowers v. Lawyers Mortgage Company**, 285 U. S. 182, and **United States of America v. Home Title Insurance Company**, 285 U. S. 191, is that a taxpayer is entitled to a classification as an insurance company where that is the business actively done and where the major portion of its income is derived from premiums plus income from proper investments.. 17

Conclusion 22

Table of Cases Cited.

Bowers v. Lawyers Mortgage Company, 285 U. S. 182 ..... 8, 9, 11, 16, 17, 18, 19, 22
Commerce Title Guaranty Company v. United States of America, Opinion of the District Court for the Western District of Tennessee, Western Division, 32 Fed. Sup. 73 6
United States of America v. Home Title Insurance Company, 285 U. S. 191 ..... 8, 9, 11, 16, 17, 19, 20, 22

Statutes Cited.

Judicial Code, Section 340-A, as amended by the Act of February 13, 1925 (Title 28, Section 340, U. S. C. A.) 8, 11
Revenue Act of 1934, Section 204 7
Revenue Act of 1935, Section 105 ..... 1, 6
Revenue Act of 1936, Section 204 7
Revenue Act of 1936, Section 401 ..... 1, 7
Rules of the Supreme Court of the United States, Rule 38 11

SUPREME COURT OF THE UNITED STATES.

COMMERCE TITLE GUARANTY COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Commerce Title Guaranty Company, respectfully shows as grounds for the issuance of a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This was a suit—originally two suits, later consolidated—instituted in the District Court of the United States for the Western Division of the Western District of Tennessee, to recover a capital stock tax exacted under Section 105 of the Revenue Act of 1935 and Section 401 of the Revenue Act of 1936, for the years ending June 30, 1936, and June 30, 1937.

Petitioner, the taxpayer, sued on the ground that it was an insurance company and, therefore, exempt from the tax. The respondent maintained that petitioner was not an insurance company within the meaning of the Act because it derived part of its income from an abstract business and from rent on its home office building.

Petitioner, the taxpayer, was incorporated for the purpose of, was during the tax years in question, and is now engaged in conducting a title guaranty business formerly operated by the Bank of Commerce & Trust Company, of Memphis, Tennessee (hereinafter called the Bank).

The Bank, as a result of a depositors' run, went into voluntary liquidation (R. pp. 66, 69; Findings of Fact 10, R. p. 35).

In addition to its regular banking business the Bank for many years maintained, among other departments, a title department in which it issued policies insuring titles to purchasers and mortgagees of real estate (R. p. 66; Findings of Fact 21, 31, R. pp. 37, 39). In the latter type of policy it guaranteed that the title and mortgage lien were valid. It did not, however, insure the collectibility of the mortgage debt.

This title guaranty business of the Bank had been highly profitable (R. p. 66; Findings of Fact 22, 27, 28, R. pp. 37, 38) until as a result of the liquidation it practically ceased, but the good will of this business and the competent title organization were distinct assets which it was desirable to preserve.

As a necessary adjunct to its title business the Bank owned an abstract company, which made and sold abstracts of title to real estate (R. pp. 146, 147, 154; Findings of Fact 26, 33, R. pp. 38, 41).

In order for a policy of title insurance to be issued the

purchaser must have first obtained an abstract of title (R. p. 146) and, in normal years, 90 per cent of the abstracts compiled by the abstract company were used as bases for the issuance of title insurance policies by the Bank (R. pp. 132, 133; Findings of Fact 26, R. p. 38).

Since the voluntary liquidation of the Bank made its title policies unsalable, it was obvious that if the assets and good will of the title business were to be preserved that business must be separated from the Bank. Hence the incorporation of the petitioner, which was formed for the sole purpose of carrying on the title guaranty business of the Bank.

It was necessary for the petitioner to have assets sufficient to assure those to whom title policies were issued that these policies represented a collectible guaranty. For this reason the Bank, from its assets, transferred and conveyed to petitioner (1) the authorized capital stock ($100,000.00) of the abstract company, (2) all of the title guaranty records formerly owned by the Bank and (3) a fifteen-story office building owned by the Bank (R. pp. 34, 78, 85; Findings of Fact 6, 7, R. p. 34). Petitioner located its office in this building, occupying the greater part of the second floor, and planned to use the building as an advertising feature on its stationery and in other ways (R. pp. 72, 73, 76, 77, 97; Findings of Fact 34, 35, R. p. 41).

The capital structure of petitioner was $1,000,000.00 equally divided into common and preferred stock and $500,000.00 5 per cent bonds, secured by a first mortgage on this office building (R. p. 37; Findings of Fact 5, R. p. 33). The Bank received all of this stock and these bonds as a consideration for its transfer of the above-mentioned assets to petitioner.

It was necessary to obtain the consent of Reconstruction Finance Corporation to this transaction because the

office building, along with the other assets of the Bank, was under a mortgage lien to that organization to secure a loan of $12,000,000.00, of which $3,500,000.00 was a first lien on the office building (R. pp. 77, 118; Findings of Fact 13, 14, 20, R. pp. 35, 37). The officials of the Reconstruction Finance Corporation were convinced of the soundness of the proposed insurance company, consented to the subordination and release of its lien on the office building and even urged that that building be included in petitioner's assets (R. pp. 72, 73, 75, 118, 119; Findings of Fact 20, R. p. 37).

When the title guaranty business was conducted by the Bank the policies which it issued were backed by its entire assets, including this office building, and also including capital, surplus and undivided profits of more than $5,000,000.00 (R. p. 77, Exs. 3-7).

Petitioner during the tax years in question carried on the title guaranty business, treating the abstract business as an adjunct to it (all of the assets of the abstract company being finally transferred to the petitioner in consideration of the surrender of the capital stock of the abstract company), but in no instance did it guarantee the collectibility of a mortgage debt.

The assets of petitioner were not only not excessive as a "back-log" for its policies, but were hardly sufficient, as some of the old customers of the title department of the Bank refused to return as customers of the petitioner until it succeeded in reducing its bonded indebtedness below the original $500,000.00 (R. pp. 75, 84; Findings of Fact 41, R. p. 42). This bonded indebtedness was reduced to $160,000.00 (R. pp. 75, 85, 119; Findings of Fact 40, R. p. 42).

Petitioner issued in excess of $20,000,000.00 of title insurance between its incorporation in 1934 and the close of the calendar year 1937, and in excess of $36,000,000.00 up

to the last day of February, 1940 (R. p. 78, Ex. 13; Findings of Fact 37, R. p. 41). A number of policies were issued by petitioner with a face value in excess of $100,000.00 each (R. p. 155, Ex. 30; Findings of Fact 39, R. p. 42).

During the tax years in question the petitioner received gross income from various sources as follows:

	1935	1936	1937
Title Department....	$ 41,634.57 (24.63%)	$ 66,946.52 (28.89%)	$ 42,429.14 (18.15%)
Abstract Department	None	$ 30,043.86 (12.96%)	$ 55,364.40 (23.61%)
Office Building.....	$127,433.63 (75.37%)	$134,771.10 (58.15%)	$136,576.67 (58.24%)

(R. pp. 39-40; Findings of Fact 32, R. p. 39.)

But these figures are based upon gross receipts, and the operation of the office building resulted in a net loss for 1936 and 1937 (Findings of Fact 44, R. p. 43). So the income from the title guaranty business represents a far greater percentage of the net income than these figures indicate. Petitioner not only absorbed the losses on its office building with its premium income, but was enabled from the same source to show a profit on its entire business.

During this period the petitioner paid taxes to the State of Tennessee and to the County of Shelby and the City of Memphis as an insurance company (Findings of Fact 42, R. p. 43). Considering that its status was the same under the federal taxing authority, the petitioner claimed an exemption from the capital stock tax in filing its return for the year ending June 30, 1936, with the Collector of Internal Revenue (R. p. 6) and similarly for the year ending June 30, 1937 (R. pp. 17, 18). Both of these exemptions were disallowed (R. pp. 10, 22). Petitioner there-

upon paid the tax as assessed (R. pp. 6, 18) and filed claims for its refund (R. pp. 12, 13, 14, 23, 24, 25). These claims were disallowed and the present suit was brought to recover the amount of the tax which petitioner maintains was wrongfully collected.

The District Court, in an opinion reported in 32 Fed. Sup. 73, denied petitioner recovery (R. p. 45).

DECISION OF CIRCUIT COURT OF APPEALS AND DATE THEREOF.

The Circuit Court of Appeals affirmed, without opinion, on the 6th day of June, 1941, expressly adopting as its own "the reasons set forth in the opinion of the District Court" (R. p. 169).

B.

STATUTES INVOLVED.

Section 105 of the Revenue Act of 1935:

"Sec. 105. Capital Stock Tax.

"(a) For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1.40 for each $1,000 of the adjusted declared value of its capital stock.

* * * * * * *

"(c) The taxes imposed by this section shall not apply—

"(1) to any corporation enumerated in section 101 of the Revenue Act of 1934, as amended;

"(2) to any insurance company subject to the tax imposed by sections 201, 204 or 207 of such Act (1934) as amended."

Section 204 of the Revenue Act of 1934:

"(a) **Imposition of Tax.**—In lieu of the tax imposed by section 13 of this title, there shall be levied, collected and paid for each taxable year upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

"(1) In the case of such a domestic insurance company 13¾ per centum of the amount of its net income in excess of the credit provided in subsection (f) of this section, * * *.

"(b) **Definition of Income, etc.**—In the case of an insurance company subject to the tax imposed by this section—

"(1) **Gross Income**—'Gross income' means the sum of (A) the combined gross amount earned during the taxable year, from investment income and from underwriting income as provided in this subsection, * * *.

"(3) **Investment Income**—'Investment income' means the gross amount of income earned during the taxable year from interest, dividends and rents, computed as follows: * * *"

Section 401 of the Revenue Act of 1936 amended Section 105 of the 1935 Act by changing the rate of tax from $1.40 per $1,000.00 to $1.00 per $1,000.00 of the adjusted declared value and by changing the reference in Subsection (c) to the 1936 Act rather than to the 1934 Act.

Section 204 of the Revenue Act of 1936 is substantially the same as Section 204 of the Revenue Act of 1934.

C.

JURISDICTIONAL STATEMENT.

The Circuit Court of Appeals, in affirming, without opinion, on June 6, 1941, and adopting as its own the opinion of the District Judge, has decided an important question

of Federal law in a way in conflict with the applicable decisions of this court, in that this court, in **Bowers v. Lawyers Mortgage Company**, 285 U. S. 182, and **United States of America v. Home Title Insurance Company**, 285 U. S. 191, held that the true test of whether a corporation was an insurance company within the meaning of the statutes here involved depended upon "the character of the business actually done in the tax years" (285 U. S. 188), whereas the Circuit Court of Appeals, in adopting the holding and opinion of the District Judge, in effect held that the question depended entirely upon the source from which the greater part of the gross income of the taxpayer was derived.

The statutory provision believed to sustain the jurisdiction is Section 340-A of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, Section 340, U. S. C. A.).

D.

QUESTION PRESENTED.

The sole question presented is whether or not a taxpayer whose business has every characteristic of an insurance company is to be denied that classification under the Revenue Acts above set out and quoted for the sole reason that a major portion of its **gross** corporate income was derived from "investment income" instead of underwriting premiums.

E.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals has decided a Federal question in a way in conflict with the applicable decisions of this court.

In **Bowers v. Lawyers Mortgage Co.**, 285 U. S. 182, and in **United States of America v. Home Title Insurance Company**, 285 U. S. 191, this Court held that the test of whether a taxpayer was an insurance company under acts identical with those here involved depended upon "the character of the business actually done in the tax years" (285 U. S. 188), and that the percentage of gross income received from premiums and other sources was merely one element to be considered in determining the character of the business actually done.

The District Judge found as a fact that the business of petitioner had every characteristic of an insurance company, but in a published opinion (32 Fed. Sup. 73) held that petitioner was not entitled to that classification because the rule was absolute that it was not entitled to such classification unless the greater portion of its income was derived from **premiums** and that when more than 50 per cent of its income was derived from "investment income" it could not be so classified. While the Circuit Court of Appeals did not file an opinion, the case was "affirmed upon the grounds and for the reasons set forth in the opinion of the District Court" (R. p. 169).

Thus the Circuit Court of Appeals, by reference, adopted as its opinion the opinion of the District Judge. The effect is, therefore, that this Court has announced that the test is the character of the business done when all circumstances are taken into consideration, while the Circuit Court of Appeals has departed from this test and adopted as the absolute and unyielding test the amount of premium income. Moreover, this Court, in analyzing the taxpayer's income, treated as insurance income "investment income," while the Circuit Court of Appeals treated "investment income" as noninsurance income, dissentitling petitioner to be treated as an insurance company. It has, therefore,

departed from the rule adopted by this Court, and for this reason the petition should be granted, regardless of whether the result reached by the Circuit Court of Appeals was right or wrong. Otherwise the effect will be not merely an incorrect decision in the instant case, but the announcement of a general rule which is incorrect in the light of the decisions of this Court, and which, unless corrected by this Court, will be applied generally in other cases.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, the full and complete transcript of the record and of the proceedings in the case numbered and entitled on its docket, "Consolidated Cases, Commerce Title Guaranty Company v. United States of America, Nos. 8644 and 8645," and that said judgment in the Circuit Court of Appeals for the Sixth Circuit may be reviewed by this Honorable Court, and for such further relief as this Honorable Court may deem proper.

WALTER P. ARMSTRONG,
J. E. McCADDEN,
Memphis, Tennessee,
Attorneys for Petitioner, Commerce Title Guaranty Company.